Commissioner Geoffrey F. Brown, Dissenting:

I object to this order for two reasons. First, this order is procedurally irregular and denies parties (and an interested public) rudimentary due process. Second, it is bad policy that undermines reasonable rules without any substantive policy basis for doing so.

Procedural Irregularity

This matter was assigned by President Peevey to Commissioner Kennedy on January 3, 2005 (without the normal paperwork that accompanies case assignments). Two days later, Commissioner Kennedy proposed a draft decision suspending in its entirety D. 04-05-057, the telecommunication consumer protection rules (commonly referred to as the "Telecommunication Bill of Rights"). The draft decision was contained as "Appendix A" to an assigned commissioner's ruling that was disseminated by e-mail. Entitled "SK1/PSW/hl2 12/13/2004," it was sent by Ross LaJeunesse at 5:16 P.M. [It is unlikely that all of the recipients on the service list know that Mr. LaJeunesse is Commissioner Kennedy's chief of staff, that SK1 is the Commissioner's e-mail moniker, or that she had been assigned the case; accordingly, it is safe to assume that some of the intended recipients did not learn immediately that a matter of great importance *and* urgency was being proffered in a manner not unlike spam (e-mail's equivalent of junk mail). The date in the title leads one to the inference that this was in the works for some time.][1] The interested public not on our service list was at a substantial disadvantage. The draft decision is now finally listed on the Commission's web site but when one double-clicks the file, there is no document whatever. To find it, one must search for an appendix to a "ruling" instead of under the title "draft decision."

Decision 04-05-057 was (my alternative version of) the telecommunication "Bill of Rights" which President Peevey and Commissioner Kennedy had opposed. It passed by a 3-2 vote. At the time of its approval (eight months ago, on May 27, 2004), Commissioner Kennedy had strenuously opposed it and had proposed an alternate decision disparaged by consumer groups as worse than no rules at all (President Peevey could not support her version).

Assigned Commissioner Kennedy's proposed suspension decision, dated Wednesday, January 5, 2005, shortened the comment period to six days (including a weekend) pursuant to Rules of Practice and Procedure, Rule 77.7(f)(9), which permits shortening of the 30-day comment period for reasons of "public necessity" (i.e., "significant harm to public health or welfare" or placing a regulatee or the commission "in violation of applicable law"). The assigned commissioner's ruling failed to state with particularity the nature of the "public necessity." Most observers believed that urgency was obviated by the executive director's letter, dated January 3, 2005, that granted telecommunication carriers an extension until April 4, 2005 to comply with no less than 26 of the rules. By its terms, the assigned commissioner's ruling required comments to be submitted by Tuesday, January 11, 2005. Reply comments were prohibited. Orders shortening time for response

[1] If our office is any indication, service in this matter was haphazard. The first ruling was delivered by mail in hard copy to us on January 7, two days after its release; the subsequent two rulings appear to have been delivered only by e-mail.

are not uncommon, particularly in proceedings where all parties know that a decision has been in theworks for some time. The approach undertaken here constitutes a surprise to parties that is largely unprecedented and borders on procedural ambush.[2]

Two days later on Friday, January 7, 2005, at 5:06 P.M., Commissioner Kennedy issued by e-mail another assigned commissioner's ruling, requiring comments on motions to modify the decision (filed by telecommunications carriers on January 6, 2005), as well as on the suspension to be filed by the following Tuesday, January 11, 2005. The motions to modify were, in essence, designed to kill the whole proceeding and eliminate the consumer rules altogether. This second ruling was sent by Christopher Mei, a secretary in Commissioner Kennedy's office, and was entitled "CPUC01-#187083-v1-R0002004_KENNEDY_RULING," a title that possibly gave some rough indication to a recipient that the California Public Utilities Commission was involved. Reply comments were again prohibited.

On January 10, 2005, Commissioner Kennedy sent out a third assigned commissioner's ruling, retracting the requirement in her January 7, 2005, ruling that comments on the motions to modify be submitted by the next day, January 11, 2005. This ruling was in deference to Rule §47(f) that requires, generally, a 30-day response period by parties. Public Utilities Code §1708 provides that the commission may rescind, alter or amend any decision "upon notice to the parties, and with opportunity to be heard as provided in the case of complaints…" In addition, Public Utilities Code §1704 prohibits service upon a party less than 10 days before the time set for hearing, absent "public necessity."

The conclusion seems reasonable that it was Commissioner Kennedy's intent to modify (and effectively "kill") D. 04-05-057 at the January 13, 2005, meeting. When it became apparent that Rule §47(f), which implements Public Utilities Code §1701, and Public Utilities Code §1704 were at variance with the procedure proposed in Commissioner Kennedy's second assigned commissioner's ruling (dated January 7, 2005), she issued an assigned commissioner's ruling abandoning the effort to modify (i.e., "kill") the decision on January 13.

The Commission meeting was scheduled for the following Thursday, January 13, 2005. At this time, the Commission had only three commissioners. They were President Peevey (who had voted on May 27, 2004, against my version of the Bill of Rights as well as against Commissioner Kennedy's alternate), Commissioner Kennedy (who had voted against my version and cast the only vote in favor of her own), and myself (I voted for my own successful version and as one of the four against Commissioner Kennedy's version).

Two commissioner-designees (Dian Grueneich and Steven Poizner, announced by the governor's office on December 16, 2004) were scheduled to be sworn in by the governor in Sacramento on Tuesday, January 11, 2005, in order that they could participate in the January 13 meeting. A flurry of legal activity ensued at the commission regarding the number of commissioners necessary for a quorum, with questions turning on disqualifications borne of financial and attorney-client conflicts. These uncertainties left many to wonder whether the potential disabilities of one or both commissioner-designees constituted the basis for a reduction in the number of commissioners

[2] It should be kept in mind that the decision being suspended is 160 pages in length and the implementing General Order (No. 168) is 51 pages in length.

necessary for a quorum. It appeared quite possible that if the new commissioners were sworn in, each or both would ask for a continuance or might abstain in this matter, thus denying Commissioner Kennedy the three votes she needed to overturn the subject decision.

An abstention or a request for a continuance was not an unreasonable prophesy, given that the *formal* file in this rulemaking is approximately 10 feet long. In addition, the lack of a reply period and the confusion about the retraction of the shortened time on the modification motion afforded reasons why the new commissioner-designees might not want to cast their first extremely controversial vote. Yet three votes would be necessary for suspension of the telecommunication rules if there were five sitting commissioners.

The governor's office announced on Monday, January 10, 2005, that it was delaying the swearing in that had been scheduled the next day. Neither commissioner-designee sought to be sworn in by any of the numerous other officials empowered to administer oaths in California in order to appear as promised at the January 13 meeting. This meant that only three commissioners were available for a vote on January 13, 2005 and, in all likelihood, only two were required for a quorum or a majority.

The notion that the two opponents of the telecommunication consumer rules, through what appeared to many to be a peculiarly-timed delay in the governor's scheduled swearing-in ceremony, could kill a decision that was the product of 4 and ½ years of work caused internal consternation within the Public Utilities Commission and among consumer advocates who had followed the proceeding for almost five years. President Peevey, presumably in deference to allaying concerns of what appeared to many observers as an unseemly haste, announced a hold on the matter, which was consequently not considered on January 13, 2005.

Thereafter, on Tuesday, January 18, 2005, Dian Grueneich was sworn in by a magistrate, not the governor. Designate Steven Poizner has not been sworn in. The reasons for his delay have not been announced.

At no point did the assigned commissioner conduct even the most cursory hearing as to whether the schedule of extensions on the effective date of implementation rules (that the Telecommunications Division and the executive director had been pursuing) was inadequate. The reason, of course, appears to be that a systematic and fair inquiry as to whether wholesale suspension was necessary would have entailed a hearing by an administrative law judge (or assigned commissioner) with notice and opportunity to be heard by parties. As it was, apparently no consultation with the assigned administrative law judge took place. A fair hearing would permit the ascertainment of opposing views, the uncovering of inconvenient facts, and time for reflection, the essence of due process. It was not to be.

The foregoing cursory recitation of this suspension's procedural history makes it clear to me that this decision did not comply with basic procedural fairness and due process. The parties in this case are not just the telephone carriers; they include as well consumer groups, the Office of Ratepayer Advocates, and the Attorney General. This hurried attempt to modify ("kill") these rules (with a shortened comment period) reverted to a rule "suspension" in which substance was irrelevant and result was everything.

The notion that, in light of the executive director's delay of most of the challenged implementation rules, "public necessity" compelled immediate action without inquiry is, plainly stated, disingenuous. The bald assertions of irreparable damage to carriers if *any* of the rules are implemented, particularly given the extensive record of existing compliance by major carriers in most areas, are simply unsupported by anything approaching credible evidence.

The goal of regulatory certainty, which is the mantra of conservatives (and *should be* the goal of regulators), is undermined and discredited when companies that complied in good faith with a new regulatory scheme are forced to spend precious resources to implement rules that are arbitrarily and summarily suspended, while their laggard and recalcitrant competitors, who relied on political pull instead of compliance, are rewarded for their bad faith. The cell carriers' united political front prohibits those who complied from complaining. This summary, arbitrary and unsupported "suspension" affords further evidence of the adage that, as to both the law-abiding companies *and* the vulnerable public, no good deed goes unpunished.

This Action Reverses Sound Public Policy Without Substantive Basis for So Doing

(The following are my prepared remarks given at the January 27, 2005, commission meeting.)

The public needs to know *why* the telecommunication rules are being suspended. The supercharged rhetoric of well-heeled advocates has misled us. We forget precisely *which* rules they find so offensive. I'll give you a hint. It is not about implementation and computer billing systems.

We have all heard unending complaints from cell carriers about the anti-business climate that these rules create. The governor, who has only heard about the rules from those who hate them, believes this. Commissioner Kennedy says she believes this.

I've heard nothing from these same people about the high cost to the economy of the fraud, inefficiency, and deception that is pervasive in the telecommunications industry. Yet these factors consistently and inexorably inflate the cost of service actually provided.

The recent history of the telecommunications industry has been one of rampant false advertising, cramming of unordered charges, confusing calling plans that penalize for calling too much or too little, and slamming that rewards fraudulent sales practices. A review of the Public Utilities Code's recent amendments confirms that the same Legislature that takes the telecom political contributions has nonetheless been very concerned about these abuses.

Only a studied ignorance, coupled with a drumbeat recitation that "competition solves everything," can deny the reality of a confusing, deceitful, and fraudulent marketplace. Our own Consumer Affairs Branch, our Legislature, consumer advocates, and public opinion polls demonstrate compellingly that the public feels it is being mistreated. Yet these concerns are dismissed as radical consumerism or anecdotal evidence.

Perhaps as a result of consumer anger, we are beginning to see somewhat more honest sales plans coming out of the cell carriers. Unfortunately, such honesty is in its infancy. The massive consolidation of fully 74% of the entire market by three companies augurs for oligopoly. Because the owners of two of the three major cell carriers are incumbent landline telephone companies, there may be little pressure to continue the reduction in prices that competition created before the consolidation. Competition solves a myriad of problems WHEN there is competition.

It is the regulation of oligopoly and monopoly, that we are sworn to perform. Our philosophical forebear, Hiram Johnson, knew only too well the power of monopolies and oligopolies. It was precisely why his initiative created an independent Railroad Commission, the PUC's predecessor, with fixed six-year terms, removable only for cause.

Today, we are confronted with a wholesale, unilateral and sledgehammer effort to kill a 4 year proceeding to create protections for the consumer. It is nothing less than shameful. Today, we do not just suspend law enforcement in cell phone sales, contracts and billing. We virtually embrace and countenance the lawlessness.

The procedural ham-handedness and short-cuts necessary to get this order before the commission violate both the spirit and the letter of our rules. The detail is unimportant. Suffice it to say that this proposed order is unsupported by evidence. It misstates the reality underlying the requests for suspension of the rules. It was hurried on to calendar with no reasonable comment period. Originally, it would have killed the rules altogether, until some procedural rules got in the way. Then its sponsor tried to get it passed by a 2-1 vote until President Peevey permitted it to be held until today, presumably because of its unseemly haste. After many changed signals yesterday, haste returned as the order of the day.

These rules are complex. Reasonable minds can differ about the efficacy of many of them. As to the fact that there is widespread fraud, deception, and confusion in contracts and billing, there is no question. To the fact that competition has not significantly modified this "Wild West" marketplace, there is no question.

My office endeavored mightily to make these rules reasonable and palatable to the industry. Two staffers and I spent six months trying to modify these rules in an attempt to try to find common ground with the cell carriers. Similarly, Administrative Law Judge Jim McVicar started five years ago and worked tirelessly on these rules. At some point, alas, one comes to the recognition that no regulation, *however reasonable and tailored,* will ever be acceptable to the cell carriers.

Their position is that consumers have all the remedies they need and that the industry's failings are so minor as not to be worthy of governmental involvement. But telephone companies themselves sue each other in our administrative courtrooms and in state and federal courts. Telephone companies avail themselves of these forums with frequency and alacrity. It is *only* when the complainant is a little guy that industry representatives eschew reasonable access to a resolution and a remedy. For the public, cell carriers want voluntary guidelines, guidelines that are unenforceable. When they sue each other, as they do with great frequency, they don't trust their opponents to work it out in a forum with no enforcement power. It is only when the complainant is

the little guy (whom Hiram Johnson championed) that sanction is deemed unnecessary by the cell carriers.

Let's talk about what will happen with this "suspension" of the rules. "Suspension," in this instance is a fig leaf for elimination. If we are to kill these rules, we should at least summarize what we're destroying. I ask you to bear with me on this.

This suspension will kill Rule 1(a) that requires every carrier to publish its tariffs on the World Wide Web. The rule conforms to and implements a 2003 law (Public Utilities Code §2890.2) requiring that carriers provide current information of available calling plans and actual usage. Apparently, telling subscribers what their plan provides and how many minutes they've used is too burdensome. Given the prevalence of plans that impose high penalties for going over one's allotted minutes, this provision would empower consumers to understand their calling plan. It, of course, cannot be permitted to see the light of day.

This suspension kills Rule 1(e) which requires that carriers shall, upon request, describe each service for which charges appear on the bill. Cramming, incomplete or incomprehensible billing, and confusion will be eliminated by the competitive marketplace, so this rule is unnecessary. If the consumer gets an erroneous bill, his carrier shouldn't be required to explain it. After all, he can get out of his contract, but it might be two years from now.

This suspension kills Rule 1(d) that requires carriers provide, on request, their legal name and the Consumer Affairs Branch telephone number. After all, as Commissioner Kennedy said in opposing the Bill of Rights, it should be hard to sue for fraud or breach of contract. Carriers use myriad different names to conceal the hundreds of corporate entities through which they operate. Not clearly disclosing the name of the actual legal entity with which a consumer does business is a good way to make it difficult for a consumer to complain. The rule requiring that the carriers list the PUC's and the FCC's phone numbers on the bill, so they will have recourse when they are cheated, will also be suspended. Suspending this rule is an expedient way to lower the number of annoying complaints.

The suspension kills Rule 2(a) that prohibits deceptive, untrue or misleading offers and false statements about rates. Obviously, truth is so subjective a quality that we can't possibly hold a carrier to such a vague and ambiguous standard, even though merchants have been held to a "truth" standard in California law for more than 70 years.

This suspension kills Rule 2(b) that prohibits use of sweepstakes entry forms to start service. Again, the Legislature in 1999 passed Public Utilities Code §2890 prohibiting such deceptions. This commission initiated an investigation into a firm named Telematch that handed out sweepstakes entry forms at street fairs. Writing your name on a stub to try to win a car or other prize changed your telephone service. After all, if a subscriber at a street fair isn't willing to take the time to read the fine print, he shouldn't be heard to complain. It was only those meddling legislators in Sacramento and the enforcement lawyers for the Consumer Safety and Protection Division that said this is fraud. Today, we suspend the rule prohibiting this.

The suspension kills Rule 3(b) that requires carriers to give customers sufficient information to make an informed choice among services. Cell carriers hate this rule because it prohibits them from up-selling to people who don't need extra services. The only problem is that the Legislature in 1993 and 1998 passed laws (Public Utilities Code §2895 and 2889.5) placing an affirmative burden on carriers to make sure subscribers know what they are ordering and what their options are. So by this suspension, we again ignore the Legislature's dictates.

This suspension kills Rule 3(e) that requires that orders and contracts be in 10-point type. They must include key rates, terms and conditions. This one really irritates the cell carriers. The law (P.U. §2890) on the 10-point type became effective in 2001, but it has been widely and flagrantly ignored by the cell carriers. Even when their contracts are in 10-point type, they often use virtually unreadable fonts, pale ink, gray or translucent paper, insufficient margins and paragraphing, and strange, unmanageable paper sizes. When confronted, they point out that no one reads their contracts any way. And this *is* true. They are unreadable and they are unread. They are contracts of adhesion in which the terms are non-negotiable. As for the key rates, terms, and conditions, the carriers insist that they cannot be bothered to give a subscriber a clear recitation of her obligations in one document at one time. Mutual agreement is the foundation of contract law. It presupposes that the competitive market will have other, different contracts. But, here we are dealing with oligopolists whose contracts contain virtually the same provisions. If you want a cell phone contract without an arbitration clause, good luck in finding it.

The suspension will kill rule 3(f) that requires a 30-day trial period for telephone service without a termination fee or penalty. This rule derives from the reality that cell carriers were selling two year contracts with substantial early termination fees, even when their phones didn't work. The carriers can predict with 95% accuracy whether potential customers would be unable to use their phone in their home or business. But they never inquired because it means they'll lose business. Carriers don't believe that if they sell you a product that doesn't work for you, they have an obligation to make things right. Neither, apparently, does this commission.

When the Consumer Bill of Rights was in the works and when our investigators were thinking of prosecuting carriers for combining the early termination fee with no trial period [because it was unjust (per P.U. §451)], the use of the no trial period began to wane. The rule prohibiting the ETF was adamantly opposed by the carriers, even though by the time of its passage, all of them had abandoned it for two years. This is perhaps the most controversial of our rules. We know the carriers have coverage maps that would allow the public to know whether their product would work for them in about 19 out of 20 of cases. They concealed this information and refused to make it available. To redress this deliberate concealment of relevant information consumers need to make an informed decision, we've imposed a 30-day trial period. This rule doesn't require that carriers give you a *new* phone for 30 days. It doesn't require that they give you service for free. It merely requires that for 30 days they can't sell you something that you cannot use and then hit you with liquidated damages or a penalty. Because they insist that transmission coverage maps are proprietary secrets, this rule requires that they give you time to try out whether their antennas work in your home and workplace. They could, of course, tell customers what they know, but they've declined to do that, so the no penalty trial period is the next best thing.

This suspension also kills Rule 3(h), which curbs win-back abuses. Often, when a customer cancels his service, the old carrier transfers him back without his consent. This rule would have prohibited carriers from transferring a former customer back without his consent. This, too, is an example of our Stalinist central planning, micro-managing, and regulatory overkill. The marketplace will, of course, correct this problem.

The suspension will also kill Rule 3(m) which requires that carriers show up for service appointments or give customers a minimum $25 credit if they don't appear. This parallels Civil Code §1722(c), which permits a small claims action of up to $600 against utilities that fail to show up for scheduled appointments. Clearly, the socialists in the Legislature, by enacting this section at the behest of constituents who've lost a day or two's wages, failed to understand the marvels of the market.

This suspension also kills the manifestly uncontroversial requirement in Rule 4 that pre-paid calling cards actually deliver what they promise. This has been an area of significant abuse, particularly in Spanish-speaking (and other non-English speaking) communities. This is an area in which the remedies provided by law are wholly inadequate. Attorney's fees exceed the amount in controversy. The Unfair Competition law has been modified to prohibit injunctions brought by citizens. The companies that sell such cards are often very hard to find. A small claims action requires time off work, some sophistication, and someone with proficiency in English. This rule provided an administrative remedy that's hard to object to, yet it, too, is suspended.

Rule 5 is also suspended. It was designed to prohibit carriers from charging deposits more than twice a customer's typical monthly bill.

Rule 6, which required that carriers establish clear, comprehensible bills that protect against unauthorized charges, is also suspended. The extent of cramming, slamming, and identifying charges as government-mandated when they are not has been an on-going, serious problem. Competition has done nothing to remedy it. Rule 6, because it essentially tells the carriers that the game-playing on unauthorized charges is over, is much hated. It, too, is effectively dead.

Rule 7, which required carriers to stop playing games on late charges, is similarly suspended. It required that carriers should credit payments when they are received. If you pay your bill two weeks after you receive it, they may now deem it late and charge you whatever fee they deem appropriate.

Rule 8, which requires that the carriers tell you in a meaningful way when they change your contract, is also suspended. Carriers have been imposing changes in *term* contracts with minimal notice. The contracts you sign often contain clauses that permit the carrier to raise rates under certain circumstances but only reluctantly permit the consumer to get out of its terms, if he manages to return a fine print notice that is usually incomprehensible. Out of deference to business efficiency, the rules permitted carriers to make changes by an opt-out provision. This means they can change your contract terms by simply sending you a notice and hoping you don't respond. The consumer, on the other hand, has no such right. So the rules required the carriers to make the notice *clear and conspicuous*, so that the consumer has a fighting chance to know that the company is

changing the rules midstream. The carriers *hate* this rule because, simply stated, it is *fair*. This order would suspend this.

Rule 9 and Rule 11 require fair procedures for billing disputes and for cutting off a subscriber's phone. (There is no rule 10 or 12, for reasons only a bureaucrat can explain.) This is akin to the household goods carrier who, upon arriving at your new house, demands an additional $5000 or he won't deliver your furniture. He has you over a barrel. There can be an analogous situation in a billing dispute over your phone. This protection is suspended.

Rule 13 requires that carriers cooperate with our Consumer affairs Branch and keep current telephone numbers. Clearly, this too is bureaucratic overreaching. It too will be suspended.

Rule 15 requires carriers who provide access to the public switched network to provide "911" emergency services whenever technologically possible. This requirement is suspended.

I could go on *ad nauseum*. This order suspends the slamming and cramming rules (Parts 4 and 5) that largely apply existing law. It suspends rules that protect consumers against phony charges added to their bills by other entities.

Let us have no illusions. Commissioner Kennedy believes that *any* regulation will strangle a nascent industry in its infancy, saddling it with rules that stifle creativity and kill innovation. She seems to deny that even the most dazzling devices can be marketed through sharp, deceptive practices.

Human nature is not rendered angelic by technological innovation. As a former public defender for 32 years, I know a bit about the darker side of human nature. Those who would defraud are not dissuaded by adulation.

No amount of self-justification will salve the wounds that today's expediency inflicts on the defenseless. Vague statements that it is our *intention* to return this matter to the commission within the year are just that: undefined, unenforceable promises. These illusory promises conceal the manifest destruction of 4 years of thoughtful work to protect consumers. The notion that this is merely a temporary setback (while implementation rules are worked out) is folly.

This is the most shameful process I've seen in my four years on the commission. This ill-considered, hurried action will haunt us for years.

For the foregoing reasons, I respectfully dissent.

/s/ GEOFFREY F. BROWN
Geoffrey F. Brown
Commissioner

San Francisco, California
January 27, 2005